VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

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Reminiscences III.

When the writer came to the bar in the Albemarle Circuit Hon. Henry Shackelford of Culpeper was judge. Culpeper County had a monopoly almost of judges in this circuit. Henry G. Field, one of its judges from 1846 to the close of the Civil War, was from Culpeper, as was also D. A. Grimsley—all splendid gentlemen and good judges. Judge Shackelford was an excellent lawyer, with a splendid mind. His two defects were impatience and a decided tendency to avoid all unnecessary work —a tendency with which the writer has always most cordially sympathized. His circuit was a large one—Albemarle, Greene, Madison, Orange, Culpeper and Fluvanna. Court met twice a year in each county except in Albemarle, where there were three terms, October, February and May, but by consent entered of record the February term was devoted exclusively to chancery causes. Judge Shackelford insisted that every case should be ready the first day of the term, and the Court-house was accordingly on that day crowded with suitors and witnesses. Cases were called in order and if the case was not ready it went to the foot of the docket, which meant a continuance. The circuit court at that time had criminal jurisdiction and also was an appellate tribunal from the county court. Chancery causes were generally heard at night and counsel on each side read the papers to the judge. Sometimes, as the judge grew older, he laid down upon his bed whilst the lawyers droned away. Once or twice his Honor's eyes would close and very suspicious sounds would emanate from the vicinity of his mouth and nose; but no lawyer ever "caught him napping." Did one but stop, the judge was wide awake and would promptly say, "Go on; go on. You were reading so and so." The writer was once reading a file from chancery papers brought by the judge from Madison County.

No counsel was present, so I was requested by the judge to read the papers to him. I read for possibly half an hour, when there were unmistakable signs of "audible slumber." So I stopped. The Judge was awake at once. "That'll do," he said, "That's Madison Law." "Make a note dismissing the bill." And he was clearly right. He was an inordinate whist player and the long nights on circuit were enlivened by many a rubber, and woe to the luckless player who did not know the game. The writer never could play whist. The fact is, he never could play poker and they say a man who cannot play that game is hopeless. One wintry night in Greene the writer was pressed into service. He was made the Judge's partner. He revoked several times and twice trumped his partner's ace. As for returning leads he simply ignored all signals. A few bad breaks and then the Judge laid down his cards. "Sheriff," he said to that officer, who was in the room, "Put this man out of the room (The only comfortable one in the hotel). Put him out of the room and don't let him come back tonight." "But, Judge," the writer pleaded, "I told you I conldn't play. At least let me stay by the fire." "Of course you said you couldn't *play*," retorted the old man, "but, d——n you, you did play and no man who plays the game like you do can be allowed to stay where the game goes on." And the writer went into outer darkness and to bed.

It is said that quite often the Judge made the applicant for a license to practice law get up a rubber, and judged him by his skill in the game. Whether true or not, he was very indulgent in the matter of licenses to practice law, saying that if a man did not know how to practice law the people would soon find it out. He was never known to refuse but one license and that was of a constable who was brought into the Judge's chambers by a mountain lawyer who introduced him to the Judge. It did not take long for the Judge to ascertain that the constable knew absolutely nothing about the simplest principles of law. He therefore told the applicant that he would have to study law before he could grant the license. The applicant left much chagrined and in a short while the mountain lawyer returned and said, "Jedge, I wish you would re-consider that license, as a per-

sonal favor to me." "But, R——," said the Judge, "the man doesn't know anything—not even his business as constable." "Why yes, Jedge," was the reply, "but you see he has paid me five dollars to get that license and is wantin' his money back." But even this plea did not prevail, and the constable continued to "ride constable."

By the way, who now speaks of "riding sheriff" and "riding constable?" And yet these terms were used constantly when the writer came to the bar. "Jim B. —— rode sheriff for twenty years," one would say; and another—"Bill —— was the poorest officer that ever rode constable." We older men can remember when the sheriff actually "rode" most of his time.

For Judge Shackelford the writer has and ever will have the kindest and most pleasant memories. Towards the writer he was ever most kindly and indulgent. We recall once, when that able and skilfull pleader Judge Watson—whom Judge Shackelford succeeded on the Bench—demurred to one of the writer's declarations, the writer saw that the demurrer had to be sustained; the Judge, as the writer was striving to argue a hopeless cause, said abruptly—"Sit down, young man!" The writer gasped and sat down. "Now, take your pen and write in your declaration what Judge Watson says ought to be there and go on with the case." "But, if your Honor please," said Judge Watson, rising, "Am I not entitled to a continuance?" "Maybe so," Judge Shackelford replied, "But you are not going to get it." And the case was tried.

At another time the Judge was ruling, as the writer thought, in a very arbitrary manner, and he and his Honor got into quite a stormy argument. Finally the Judge rapped once or twice with his gavel and then said: "There is but one thing you can do in this case, and I advise you to do it and quit." "And what is that, sir?" the writer very angrily asked. "The amount involved is under five hundred dollars and I cannot appeal." A broad smile came on the old gentleman's face and his eyes twinkled. "You can go out behind the courthouse and cuss the court." And in the laugh that followed the writer forgot to be angry any longer.

The Judge became totally blind before his death but maintained a brave and cheerful spirit unto the end.

The circuit court was first known as the Circuit Superior Court of Law and Chancery. The first court held in Albemarle was held by Judge Archibald Stuart, of Staunton. His circuit consisted of Bath, Rockingham, Augusta, Amherst, Nelson and Albemarle. He held his first court in Albemarle on the 8th of May, 1809. That day qualified to practice law in his court John Walker, Philip P. Barbour and James Garland. The first of the trio had been Washington's confidential aid-de-camp and was a kinsman of the General and had been United States Senator. James Barbour was to be Governor of Virginia, United States Senator, Secretary of War, and Minister to England. Philip P. Barbour was to be a member of Congress, Speaker of the House of Representatives, Judge of the General Court, and Justice of the Supreme Court of the United States.* Surely this was the beginning of a bar of which Albemarle had reason to be proud.

Judge Stuart had been a soldier in the Revolution; had fought at the Battle of Guilford Court-House. He had read law under Mr. Jefferson, who was his warm personal friend and who designed the house in Staunton in which Judge Stuart lived and died, and in which his descendants yet live, and under whose magnificent old rooftree the writer spent many happy days of a happy boyhood and youth—to which he still returns to meet the sweet welcome which neither time nor age has made less sincere and sweet. We may state *en passant* that with his usual habit—as far as domestic architecture was concerned—Mr. Jefferson had to omit something essential, so he left out a fireplace in one room, which by some irony of fate he always occupied when he went to visit Judge Stuart, and which is still known as Mr. Jefferson's room.

Judge Stuart was a member of the Convention called to ratify the Constitution of the United States. He was the father of Hon. A. H. H. Stuart, member of the Virginia Legislature, of the Congress of the United States, and Secretary of the Interior

*James Garland was the Father of Hon. James Garland member of Congress and Judge of the Hustings Court of the City of Lynchburg, member of the House of Delegates of Va. when he was 84 years of age and died well over ninety.

under President Fillmore. Mr. Stuart was a lawyer of great eminence and a statesman worthy of the old Commonwealth's best days.

The last order signed by Judge Stuart was on the 9th of May, 1831, and in Oct. 1831, Judge Lucas P. Thompson, also of Staunton, came to the Bench, filing the certificate of Lindsay Coleman, J. P., of Amherst County, that he had taken and subscribed:

1. An oath of fidelity to the Commonwealth.
2. An oath to support the Constitution of the United States.
3. An oath known as the anti-duelling oath.
4. An oath as a judge of the General Court.
5. An oath as Judge of the Circuit Superior Court of Law and chancery.

And having seen him thus duly sworn in, we will leave him for future reference.

When Is a Foreign Corporation Engaged in Doing Business So as to Bring It under the Purview of Section 3848, Code of 1919?

Section 3848 of the Code of 1919 provides, *inter alia,* "No such foreign corporation shall recover any money, or property, or enforce any contract in any court without first obtaining the certificate of authority to do business in this State, provided for in the preceding section, nor until all taxes, fees and charges due to the State have been fully paid."

In view of this Section it is right important that the lawyers representing foreign corporations should know exactly what constitutes doing business in a state. There has never been any direct decision upon this section, and so far as we know, the only case which has come up under it is the case of Dalton Adding Machine Company *v.* State Corporation Commission, 213 Federal Reporter, page 889, and that was upon the question of enjoining our State Corporation Commission from taking any steps to make the Corporation comply with the Virginia law, on the ground that any such action was in the nature of a hindrance, or interference, with Interstate Commerce. The

lower court denied the injunction and later on the Company was fined by the State Corporation Commission and this action of the Commission was sustained in Dalton Adding Machine Company *v.* Commonwealth, 118 Va. 553. The section also went up under the case of General R. R. Signal Company *v.* Virginia, 118 Va. 301, in which the Company was fined for doing business in the State without having first complied with the law of this State. The Supreme Court of the United States sustained both decisions, the opinions to be found in 246 U. S., page 497 and page 500. In the Dalton case the Company brought its machines into the State before selling them, kept a stock of machines for exhibition and trial, and sold such machines in the State, after their transportation from another state had become concluded. They sold and rented the machines, and kept in the State certain parts of the machines, and a stock of paper and ribbons suitable for use upon the machines, which was sold from time to time by the corporation's agents in the State. In the General Railway Signal Company, the company in carrying out its contracts for installation within the State of automatic railway signal systems, employed in the State labor skilled and unskilled, to dig the ditches in which conduits for the wires were placed, constructed concrete foundations and painted the completed structures. In both of these cases the companies were held to be doing business in the State. The weight of authority seems to be that wherever goods are brought into the State and sold, this is doing business.

In the case of Despres Bridges, etc. *v.* Zierleyn, 163 Michigan, it was held that a travelling salesman who himself delivers goods within the State, brings his foreign corporation within the rule of doing business, and the corporation having failed to qualify, it was not allowed to collect for the goods sold. So in Oklahoma, Bailey *v.* Peary Manufacturing Company, 158 Pac. 581, it was held that where goods were shipped by a foreign corporation into the state, no purchaser having ordered them, but to be held in stock by the agent and thereafter sold or delivered to a purchaser, the corporation was doing business in the state and was subject to the foreign corporation law. Where goods were brought within the state by travelling salesmen and

displayed and directly sold for the corporation, it was held in the Union Cloak and Suit Company *v.* Carpenter, 102 Ill. A. P. P. 339, that the foreign corporation was doing business in the state; and in Minnesota, in the case of Sherman, etc., Company *v.* Aughenbaugh, 93 Minn. 201, it was held that where the goods were sent to the travelling salesman himself, for delivery by him to the customer, the corporation which was a foreign one was thus doing business in the State.

The rule seems to be otherwise where the business in the State is confined to the soliciting of orders through travelling salesmen or drummers, and this rule is laid down in a large number of cases, among which are: Kirven *v.* Virginia-Carolina Chemical Company, 145 Fed. 288; Aultman *v.* Holder, 68 Fed. 467, affirmed in 169 U. S. 81; Herman Bros. Co. *v.* Nasiacas, 46 Colo. 208; Lehigh Portland Cement Company *v.* McLean, 245 Ill. 326; Brener *v.* Kansas, etc., Co., 168 Fed. 218; Mutual Manufacturing Co. *v.* Alspaugh, 174 Ind. 381; Belle City, etc., Co. *v.* Frizzell, 11 Idaho 1; Barnhard Bros. *v.* Morrison, 87 S. W. 376; Rock Island, etc., Co. *v.* Peterson, 93 Minn. 356; Elliott *v.* Parlin, etc., 71 Kan. 665. The foregoing decisions, however, are confined in their application and are said in Bondurant *v.* Dahnke-Walker Milling Co., 175 Ky. 774, 195 S. W. 139, to "rest upon the theory that orders taken for goods by travelling salesmen in the employ of foreign corporations do not constitute the contract itself, and that the contract has existence only from the time of the confirmation of the order."

It is said, however, in Bondurant *v.* Dahnke-Walker Milling Company, 175 Ky. 774, that this rule rests upon the theory that orders taken for goods by travelling salesmen in the employ of foreign corporations do not constitute the contract itself, and that the contract has existence only from the time of the confirmation of the order, and in Low *v.* Davy, 83 N. J. Law 540, the court held that a foreign corporation was not doing business where the order had been taken by a travelling salesman, with a stipulation in the contract that the contract was subject to the approval of the home office in another state. And in Frank Prox Company *v.* Bryan, 185 Ill. App. 322, the court decided

that the fact that travelling salesmen sometimes fill orders by purchasing articles from a company within the state, did not take the foreign corporation out of the rule that qualification was unnecessary. And in American Art Works *v.* Chicago Picture Frame Works, 184 Ill. App. 502, it was held that a listing of an office in the state as headquarters for salesmen, the rent being charged to the salesmen themselves, as not sufficient to make it necessary for the foreign corporation to qualify.

A rather curious variation of the rule is to be found in the case of Rex Beach Pictures Company *v.* Harry I. Garson Productions, 177 N. W. 254. The Rex Beach Pictures Company, a Maine Corporation, owned a film called "The Barrier." It made a contract with the Selznick Company a New York Corporation, for the distribution of the picture. This latter company as agent for, and with the express consent of the former company, employed the Garson's Production Company, Incorporated, a Michigan agent for the picture. The only purpose of this agreement, as the Supreme Court of Michigan held, was to create an agency or means whereby the Rex Beach Company, a foreign corporation, "in the conduct of ordinary business, was to derive a continued revenue from the exhibition of its motion picture (of which it always and at all times remained the absolute owner) to audiences assembled in different Michigan theatres, and from revenues so derived to receive as its share of the income produced by such acts performed in Michigan 80 per cent of the gross receipts, income and revenue." The court holds that the Rex Beach Company was carrying on business in Michigan in a sense that required its securing authority to do business therein as a foreign corporation. Although this subjected the corporation to the penalties provided by statute (Compiled Laws 1915, sections 9063, 9067, 9068), the company could maintain an action of replevin to recover its films. On this point the court says: "The authorities are uniform in holding that replevin is a personal action *ex delicto* brought to recover goods unlawfully taken or detained. Unless the statute says so, the noncompliance by a foreign corporation with the terms and conditions upon which the domestic law allows it to enter the

state and do business will not preclude it, or any one claiming through it, from maintaining an action which is purely *ex delicto*. We have no doubt that under the provisions of our statute, above referred to it was unlawful for the plaintiff to carry on its business in this state; and it was incapable of making a valid contract for such purpose until it had complied with the requirements of the statute. A penalty is provided for the violation of these provisions, and in our opinion, the contract was void, and against the settled policy of this state." The court reviews cases holding that a non-complying foreign corporation may not recover from its agents money collected under its contracts with them. Nevertheless it holds that such a corporation is entitled to recover its property, in this case the films in possession of its agent. This would not be the law in Virginia, for our Statute expressly holds that a foreign corporation which has not qualified in this State "shall not recover any money *or property* or enforce any contract in this State."

Compromise of Minors of Damages for Personal Injuries. Section 6365 of the Code.

The case of *Clinchfield Coal Corporation* v. *Couch,* decided at Staunton by our Supreme Court of Appeals September 16th, 1920, is interesting from a two-fold aspect. The plaintiff was a minor who was injured in a mine and compromised with the defendant for $139.14. On coming of age he sued the company and recovered four hundred dollars damages. He was hurt April 16th, 1915—compromised May 21st, 1915; became of age March 3rd, 1916, and instituted this action March 1st, 1917—just two days before the cause of action would have been barred under the Virginia Statute. The Supreme Court—and it is the first decision upon this point in this state—has decided that when an infant has compromised his claim for damages for a personal injury and executed a release of his cause of action, he may, after he attains his majority, repudiate such compromise and recover just damages, but he must credit thereon the sum which he received by way of compromise and settlement.

To support this view the Court cites 14 R. C. L. 243, *Baker* v. *Lovett,* 6 Mass. 78; *Bonner & Eddy* v. *Bryant,* 79 Tex. 540; *Worthy* v. *Jonesville Oil Mill,* 77 S. C. 69; and other cases sustaining the view taken by the Court. That this is just and right no one can doubt. The person injured should not receive for the injury anything more in damages than the amount a jury ascertains were his damages, and from those damages thus allowed should be deducted, of course, any amount he has previously received on account of such damages. We think, however, in such cases the safe rule would be to instruct the jury that in estimating damages they should give credit for any amount previously received.

The other interesting feature of the decision is that the Court, for the first time since its adoption, avails itself of the revised Section 6365 of the Code of 1919. As the law originally stood it was provided that the Appellate Court should enter such judgment, decree or order "as the Court whose error is sought to be corrected ought to have entered." In lieu of this language the revisors have provided that the Appellate Court shall enter such judgment, decree or order "as to the Court shall seem right and proper, and shall render final judgment upon the merits, wherever in the opinion of the Court the facts before it are such as to enable the Court to attain the ends of justice."

This applies to criminal as well as civil cases, we take it from the language of the next paragraph: "A civil case shall not be remanded for trial *de novo* except, etc., etc.," and would permit the Court to shorten the term of imprisonment of one convicted of crime, or reduce the punishment of death to a term of years in the penitentiary, if the Court saw fit. Whilst we have always approved the law determining that it was the peculiar province of the judge to determine the punishment after the jury had fixed the guilt—as it used to be at one time in this State, and is today in most of the states of the Union—yet this seems a very wide departure from the tendency of the lawmakers in this State, who have made the judge a mere mouthpiece to proclaim the rendering of the jury to the unfortunate criminal in the dock, and given him no power except to grant a new trial when he thought the punishment was excessive.

In civil cases we think it will go far to enable the Court to end litigation. This revision has to some extent, in a quiet way, met with criticism from lawyers in different portions of the State. We deem it hardly fair to criticize it adversely until we have seen how it works. In the instant case there can be no doubt of its wisdom and propriety.

Collateral Inheritance Taxes. Double Taxation.

In the case of *Cornett's Exors.* v. *Commonwealth,* decided at Staunton Sept. 20th, 1920, our Court reiterates the well-settled principle that an inheritance tax is not upon the property itself, but is an impost or excise which is imposed as a condition precedent to the transmission or transfer of property from the dead to the living. The right to succeed to property of a decedent is a creature of law only secured and protected by its authority, which right the Legislature may in its discretion restrict; for it depends upon the Statute of Wills and the Statute of Descents and Distribution. It is a tax upon a civil right or privilege which is granted by the State upon such terms as may be imposed. The man who puts his property into United States bonds or non-taxable securities, with the fond idea that his children will not have their fortune diminished by an inheritance tax, is entirely mistaken; for unless the state statute is so drawn as to exempt such property it will be subject to the inheritance tax. In the instant case, Cornett, a citizen of Virginia, owned a stock in a national bank located in Missouri. His administrators in Missouri sold the stock, which had been charged with an inheritance tax in Missouri. The proper officers in Virginia claimed a collateral inheritance tax on the proceeds of the sale of stock—Cornett dying in Virginia and leaving his estate to nephews and nieces in this State. The lower court held that the money was subject to this tax, overruling the contention that it was not estate in the Commonwealth and that it was a double tax, and our Supreme Court sustained the ruling of the lower court. There are too many instances in which the courts of this Union have held that double taxation was not invalid—as vexa-

tions, burdensome and contrary to the common sense of justice as it seems—to call this decision in question.

The interesting, and to us far-reaching importance, of this decision is contained in its conclusion, and we trust the doctrine thus laid down may become the fixed rule of the court. "It is unnecessary," says Judge Prentis, delivering the opinion of the court, "to discuss alleged defects in the procedure which are relied upon by the Commonwealth, because even if the procedure were not above criticism, the result here would be the same, and it is always preferable to decide the merits of a controversy."